

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 15-CR-637(KAM)
: :
-against- : United States Courthouse
: Brooklyn, New York
: :
MARTIN SHKRELI AND EVAN : Monday, May 15, 2017
GREEBEL, : 2:00 p.m.
: :
Defendants. :
: :
- - - - -X

TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Court Reporter: Angela Grant, RPR, CRR
Official Court Reporter

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1 (In open court at 2:01 p.m.)

2 (Defendant Evan Greebel present in open court.)

3 COURTROOM DEPUTY: All rise.

4 This is criminal oral argument on Mr. Greebel's
5 motion to strike language from paragraph 7 of the
6 Superseding Indictment and to dismiss Count Eight of the
7 Superseding Indictment.

8 Will counsel on behalf of the government state
9 your appearances, please.

10 MS. KASULIS: Sure. Jacquelyn Kasulis, Alixandra
11 Smith and Karthik Srinivasan for the government.

12 Good afternoon, Your Honor.

13 THE COURT: Good afternoon.

14 COURTROOM DEPUTY: And on behalf of Mr. Greebel.

15 MS. RUBIN: Lisa Rubin and Reed Brodsky for
16 Mr. Greebel.

17 MR. BRODSKY: Good afternoon.

18 THE COURT: Good afternoon.

19 Good afternoon, Mr. Greebel.

20 All right. This is the defense motion so if you'd
21 like to be heard, I'm happy to hear from the defendant.

22 MR. BRODSKY: Yes. Thank you so much, Your Honor.

23 Our first motion is a motion to strike the
24 surplusage which is found in the prefatory language of
25 paragraph 7 of the Superseding Indictment. As Your Honor

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1 knows, it appeared originally in the indictment filed in
2 December of 2015 in paragraph 7. Then it was the allegation
3 in paragraph 7 "In or about and between September 2009 and
4 September 2014, the defendant, Martin Shkreli, together with
5 the defendant Evan Greebel and others, orchestrated three
6 interrelated fraudulent schemes."

7 And then it appeared under paragraph 7, (a) was
8 the MSMB Capital scheme; (b) was the alleged MSMB Healthcare
9 scheme; and (c) was the alleged Retrophin scheme. Then in
10 the Superseding Indictment, as Your Honor knows, filed on or
11 about June 3, 2016, the government, on paragraph 7, had the
12 exact same prefatory language with one exception, the three
13 interrelated, alleged interrelated fraudulent schemes became
14 four interrelated fraudulent schemes; 7(a) was the MSMB
15 Capital scheme, 7(b) was the MSMB Healthcare scheme.

16 Your Honor, what this has done from the very
17 outset from our perspective is it has created the very, very
18 clear misimpression that Mr. Greebel has been charged in
19 connection with and orchestrating with Mr. Shkreli the MSMB
20 Capital Hedge Fund Scheme and the alleged MSMB Healthcare
21 Hedge Fund Scheme.

22 Now, taking a step back, that language in
23 paragraph 7 is reincorporated in all of the charges from One
24 through Seven -- One through Eight -- One through Seven and
25 then One through Eight. Mr. Greebel is not mentioned at all

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1 in paragraphs 8 through 15 describing the MSMB Capital Hedge
2 Fund Scheme; in paragraph 16 through 20 describing the MSMB
3 Healthcare Hedge Fund Scheme; in paragraphs 41 to 47, which
4 are Counts One through Three; and Counts Four through Six,
5 paragraphs 48 to 54.

6 Then the government reflected in their recent
7 submission from their submission with respect to Rule 104
8 the request for a 104 hearing. And then later with their
9 opposition to the motion to strike the surplusage, the
10 government appears to us essentially says that they are not
11 alleging Mr. Greebel was involved in, participated in
12 orchestrated the MSMB Capital Hedge Fund Scheme or the MSMB
13 Healthcare Hedge Fund Scheme, and, in essence, what we have
14 here is a mistake. It appears to us the government is
15 acknowledging that. And this mistake, this document which
16 is originally the indictment and then the Superseding
17 Indictment, is the most important document in the case. It
18 is the most important document because it is the charges
19 against Mr. Greebel, and so it's very significant to us that
20 it appears there. And it goes to a core of our defense.

21 And as Your Honor knows, Counts -- the hedge --
22 the MSMB -- the alleged MSMB Capital Hedge Fund Scheme and
23 then the MSMB -- the alleged MSMB Healthcare Hedge Fund
24 Scheme are the predicates. The government uses the word
25 "interrelated," and then they serve as the predicates for

1 the alleged Retrophin-related schemes charged in Count Seven
2 and Counts Eight.

3 One of our core defenses, as Your Honor knows, is
4 that Mr. Greebel was lied to and so any allegation that
5 suggests he was a participant or a knowledge of the MSMB
6 Hedge Fund Schemes is quite significant and proof that
7 Mr. Greebel had no involvement and that there won't be any
8 allegation that he knew about, approved, condoned in any way
9 these MSMB hedge fund schemes. It's quite significant to
10 our defense.

11 Now, the government, in their opposition, it
12 appears to acknowledge, seems to acknowledge that it's a
13 mistake. They said we should ignore the language or that
14 the language doesn't mean what it says. And then in a
15 footnote they say, in Footnote 12, that they offer to strike
16 the language the defendant, Evan Greebel, in paragraph 7 of
17 the prefatory language, if Your Honor sends the indictment
18 back to -- with the jury.

19 Looking at the case law, that's not sufficient.
20 If it's a mistake, it should be stricken. And I'll explain
21 the prejudice, Your Honor, to us.

22 THE COURT: Well, what if the government does
23 agree to strike it regardless of whether I send the
24 Superseding Indictment back to the jury, would you be
25 willing to do that, that little phrase in paragraph 7 that

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1 reads "together with the defendant Evan Greebel and," the
2 word "and"?

3 MS. KASULIS: Your Honor, our position is that
4 there actually is no legal basis to do so so we oppose that.

5 We had offered, if the indictment was to be sent
6 back to the jury, to obviate any risk of confusion with the
7 jury that it could be stricken, but we do not believe that
8 there's a legal basis to do so.

9 THE COURT: I mean, I'll tell you frankly, just so
10 you're prepared, I probably would allow the indictment to go
11 back to the jury with the instruction that this is not
12 evidence but rather frames the counts and defines the counts
13 that the government will have to prove, that is, Counts
14 Seven and Eight, beyond a reasonable doubt.

15 MS. KASULIS: And, Your Honor, if Your Honor is so
16 inclined to do that, we'd have to redact the indictment
17 anyway because it would be referring to both defendants in
18 the indictment. And so doing the additional redaction it
19 wouldn't stand out or anything like that with respect to
20 what's sent to the jury.

21 THE COURT: All right. Would that just moot that
22 first basis for your motion?

23 MR. BRODSKY: Almost, Your Honor.

24 I don't want to take a position now because we
25 haven't done the research, and we would want to do the

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1 research on whether or not we could take a position on
2 sending the indictment back with --

3 THE COURT: All right.

4 MR. BRODSKY: -- with the jury.

5 THE COURT: You're definitely welcome to argue
6 against it. I do it in cases where there's a lengthy
7 indictment. This is not particularly lengthy. It's only
8 really 34 pages long, but sometimes the jurors will be
9 assisted with understanding the charges if they have the
10 indictment.

11 As you know, the indictment goes well beyond just
12 reciting the elements of each of the counts, but rather sets
13 forth a lot of background facts which, again, the government
14 will have to prove beyond a reasonable doubt, but I think is
15 helpful to the reader to understand the nature of the
16 charges.

17 MR. BRODSKY: I understand, Your Honor. And I
18 would want to research it only because there is something
19 about an official document from a grand jury, you know. The
20 jurors generally don't have as sophisticated understanding
21 of the criminal justice system, and although Your Honor, I'm
22 sure, will instruct them, a grand jury only needs to find
23 probable cause, 51 percent likelihood and it's a partial
24 presentation of the evidence from the government in secret.
25 An official document, we would want to think about whether

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1 or not we would have an issue and express it to Your Honor
2 about sending an official document back. But given that and
3 given the possibility that we -- and what the government
4 said is that they would redact, if Your Honor sent it back
5 to the jury, most of the paragraphs. I mean, a good part of
6 this indictment, many of the pages, relate to the MSMB
7 Capital and MSMB Healthcare Hedge Fund Schemes and so a
8 significant amount of this 34 page or document would be
9 redacted and omitted and it would become even more
10 simplified.

11 THE COURT: And your argument that the jury would
12 be confused by the language in the indictment would then be
13 moot I would think.

14 MR. BRODSKY: Yes, Your Honor, if you do send it
15 back.

16 THE COURT: All right.

17 MR. BRODSKY: I would want to reserve that if Your
18 Honor does not send it back, because we object and Your
19 Honor is persuaded by our objection, the reason it should be
20 stricken is the law is very clear that if a jury could draw
21 an inference that the defendant is accused of crimes that
22 they're not charged in the indictment with, it should be
23 stricken. The law is also clear -- and that's the United
24 States versus DeFabritus case.

25 In United States versus Booth there was -- the

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1 Court -- the district court there said the language should
2 be stricken if it's inconsistent with the government's
3 theory.

4 And then finally, Your Honor, there's good case
5 law that reflects that if the language adds nothing to the
6 charges, it gives no further information, and it creates the
7 danger a prosecutor at trial could impermissibly enlarge the
8 charges, then it should be stricken.

9 For all those reasons it's prejudicial to us, and
10 the reason why it's significant not only with respect to
11 Your Honor sending it back to the jury, if the indictment
12 gets sent back, is we want the very clear ruling that
13 Mr. Greebel is not alleged to have orchestrated and been
14 involved in the MSMB Capital Hedge Fund Scheme and the MSMB
15 Healthcare Hedge Fund Scheme. He hasn't been charged with
16 that.

17 The language that he's been charged with is very
18 clear in Count Seven and Eight. And what we don't want to
19 happen at a trial is -- and I don't like to object during
20 openings -- is the government to get up and even though the
21 indictment is not sent back, we will hear the phrase
22 "interrelated schemes" and that Mr. Greebel and Mr. Shkreli
23 orchestrated it and/or they did it together. And that would
24 be extremely damaging and impermissible from our
25 perspective. It would be a violation of due process, it

1 would be a violation of inferring to the jury that
2 Mr. Greebel has been charged with something that he's not.
3 And the government, in its motion on page 12, alleged that
4 in connection with the motion where they oppose our motion
5 to strike and they oppose Mr. Shkreli's various motions,
6 they actually alleged that Mr. Greebel and Mr. Shkreli were
7 involved together improperly classifying an investment by
8 MSMB Healthcare and Retrophin as a loan. That's a quote
9 from the government's brief on page 12.

10 And it makes us very nervous that the government
11 has included this interrelated language in at least four of
12 their briefs since the fall of last year. Actually, it
13 started with their opposition to a stay of -- in their
14 motion opposing our motion to continue the SEC case they
15 used that language and then they picked out that language in
16 multiple other motions with respect to the Bill of
17 Particulars and with respect to severance. And although
18 there are literally hundreds of paragraphs including sub
19 paragraphs in the indictment, that language was relied on by
20 the government in various motions, and so it makes us
21 extremely nervous if that's not stricken.

22 THE COURT: Well, let me ask you something: Are
23 you taking the position that the government will be unable
24 to present any background information about Counts One
25 through Six given that you have a separate trial?

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1 MR. BRODSKY: No.

2 THE COURT: Because I think it was clear
3 throughout the arguments and in the briefing that the
4 government did intend to provide background evidence of what
5 happened beforehand, that is, before Mr. Greebel got
6 involved in the activities charged in Counts Seven and
7 Eight.

8 MR. BRODSKY: Understandably, Your Honor. They
9 will bring in that Mr. Shkreli was involved in misleading
10 investors allegedly with MSMB Healthcare and MSMB Capital
11 and we fully expect that and we understand Your Honor's
12 ruling on that area.

13 What we don't find acceptable, is because he
14 hasn't been charged in Counts One through Six and he
15 hasn't -- there's no allegation that he was involved in
16 orchestrating Counts One through Six. The government may
17 present that argument on Counts One through Six to the jury,
18 but it should be clear that that is an allegation against
19 Mr. Shkreli and others and not an allegation against
20 Mr. Greebel.

21 And if they're going to allege otherwise, if
22 they're going to argue otherwise before the jury, we deserve
23 fair notice and we deserve the ability to, to argue against
24 that.

25 Beyond that, Your Honor, that's with respect to

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1 this case and that's why it's important, we believe you
2 should strike it with respect to this case. But beyond that
3 allegations by the government against Mr. Greebel,
4 regardless of result in his trial, they live forever and so
5 the government and its agencies and divisions will rely on
6 the charging instrument for how they say Mr. Greebel, what
7 he was charged with. And it's important to us that he's
8 not been charged with respect to Counts One through Six and
9 yet paragraph 7 precludes us from saying that given the
10 language.

11 So that's why, Your Honor, we believe the case law
12 supports us. We understand the government's argument,
13 principal argument against it is they say that they're
14 not -- they're rarely granted. But to me the argument that
15 you're rarely granted simply is a reflection of two things;
16 one, it's rare for the government to make a mistake like
17 this in an indictment. And, two, it is, it is maybe perhaps
18 not common. I haven't done a study as to how many people
19 move to strike when there is an allegation that's a mistake
20 in an indictment.

21 When presented though, there are cases that
22 reflect when there's a clear mistake, it should be stricken.

23 THE COURT: Well, why isn't the language in each
24 of the first six counts where only Mr. Shkreli is named, why
25 is that not sufficient and clear and why does it create

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1 confusion?

2 If one reads, you know, after reading the
3 paragraphs 1 through 40 are repeated and incorporated in
4 each of Counts One through Six, the very next paragraph
5 charges only Mr. Shkreli. Why would there be a reading of
6 these counts that would suggest that Mr. Greebel was named
7 or charged in Counts One through Six?

8 MR. BRODSKY: Unfortunately, Your Honor, because
9 of the very language in paragraph 7, the prefatory language,
10 so if that language was not there and it was not
11 reincorporated before every count -- so if you look at every
12 count, the first paragraph under every count says the
13 allegations contained in paragraphs 1 through X are
14 realleged and reincorporated, and so that includes paragraph
15 7 in each and every one. And paragraph 7 is very clear,
16 unfortunately, that it says Martin Shkreli, together with
17 the Defendant Evan Greebel and others, orchestrated four
18 interrelated fraudulent schemes. There is -- first of all,
19 Your Honor, that's the reasonable way to read it, we
20 certainly read it that way. We know Your Honor quoted that
21 language in your opinion with respect to denying the -- with
22 respect to the stay issue. The government has quoted that
23 language multiple times. Mr. Shkreli in his motion for
24 severance or his motion for reliance on the advice of
25 counsel with respect to severance relied on that actual

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1 language, quoted it, and suggested that Mr. Greebel was
2 involved in these MSMB Capital schemes, and that served as
3 the basis for one of his arguments for reliance on the
4 advice of counsel. So without that language, Your Honor, I
5 would say it is clear. But with that language,
6 unfortunately, it is not clear.

7 And we have a legitimate fear that what the
8 government will do is they'll say, you have notice that he
9 was charged with orchestrating the MSMB Capital Hedge Fund
10 Scheme and the MSMB Healthcare Hedge Fund Scheme.

11 THE COURT: What is the good-faith basis for that
12 fear when they've represented they're not going to do that?

13 MR. BRODSKY: What they've represented -- I've
14 tried to parse the language of their opposition, Your Honor,
15 and I'm having -- I'm struggling with understanding exactly
16 the basis for their opposition. So if I go to their
17 opposition, to our motion to strike, and that's, again,
18 docket number 189. And if Your Honor turns to the language
19 in their pages 36, 37, and the top of 38, it is not clear
20 what they're saying from our perspective.

21 And if there is no prejudice to the government
22 from striking this language, and we can't even fathom one,
23 the government hasn't alleged this prejudice to them from
24 striking the language. We can't even conceive of what
25 possible prejudice there is to the government from striking

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1 language that they are going to concede is not an argument
2 they're going to make, then why not strike the language?
3 Just because it's rare does not mean it's incorrect to
4 strike the language. The correct thing to do is if they're
5 not going to allege that Mr. Greebel orchestrated with
6 Mr. Shkreli these other schemes, the correct thing to do is
7 to strike the language. There's no harm to them.

8 And so when you weigh the harm to us and the
9 potential harms to us against the zero harm to the
10 government from striking this language --

11 THE COURT: Other than the fact that this is in a
12 record that will survive time as you say, that is, referring
13 to the Superseding Indictment, and assuming then I don't
14 send back the Superseding Indictment with the jury, what is
15 the harm to you --

16 MR. BRODSKY: If Your Honor --

17 THE COURT: If they've represented they're not
18 going to, you know, expand the charges?

19 They cite in their opposition Second Circuit law
20 that the motion to strike should not be granted unless "the
21 challenged allegations are not relevant to the crime charged
22 and are inflammatory and prejudicial."

23 And then they cite other cases that say even if it
24 is prejudicial, it shouldn't be stricken if the language --
25 if evidence of the allegation is admissible and relevant to

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1 the charge.

2 You've conceded that evidence regarding Counts One
3 through Six will be admissible and relevant to the jury's
4 understanding of Counts Seven and Eight so I'm not getting a
5 sense of what your showing of prejudice is.

6 MR. BRODSKY: The showing of prejudice, Your
7 Honor, is just that language. We have no issue --

8 THE COURT: But you can't -- talk about
9 tautologies. It's prejudiced because the language is
10 prejudicial.

11 MR. BRODSKY: I'm sorry, Your Honor. Let me list
12 out the various prejudice.

13 THE COURT: All right. Because they've already
14 said they're not going to be expanding the charges; that the
15 jury will be instructed accordingly; that Mr. Greebel is
16 only charged in these two counts, Count Seven and Eight.
17 And, again, even if prejudiced -- even if prejudicial, it
18 shouldn't be stricken if evidence regarding the allegation
19 is admissible and relevant.

20 MR. BRODSKY: Well, we cite some cases, Your
21 Honor, where courts did -- district courts did, despite that
22 other language from cases, strike the language because it
23 was clearly a mistake and clearly inconsistent with the
24 government's theory of the case. The same holds true here,
25 it's inconsistent with the government's theory of the case,

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1 and it's -- and it creates a risk of confusion.

2 If the government is going to stand up and say we
3 are not going to allege ever in front of this jury that
4 Mr. Greebel orchestrated with respect to the scheme to
5 defraud MSMB Capital Hedge Fund investors and MSMB
6 Healthcare Hedge Fund investors, and Your Honor doesn't send
7 back the indictment and they're not going to make such an
8 argument and they're precluded from making such an argument,
9 then the prejudice to us is in the future with respect to
10 people picking up the indictment and the probation officer,
11 God forbid if there was any, a finding of guilt, which we
12 don't believe there would be on the evidence, and the way
13 other -- even if there's an acquittal, Your Honor, the way
14 other federal government agencies work, if you ever apply
15 for a job or you ever look for something, they always look
16 to the indictment as to what the charging language is.

17 THE COURT: I don't necessarily know that you have
18 an evidentiary basis for making that statement. I mean, and
19 even if it were true, the indictment here clearly fails to
20 charge Mr. Greebel in Counts One through Six. You know, the
21 name is capitalized, his name doesn't appear anywhere in
22 those first six counts. I'm just not sure how you could
23 argue that this is a risk.

24 MR. BRODSKY: Well, the only thing I'd rely on,
25 Your Honor, for that is how the average reader, the

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1 reasonable person, would read paragraph 7. And how it's
2 been cited over and over again by the government and it was
3 cited for Mr. Shkreli for his purposes. And so we read this
4 language, and we parsed this indictment from December of
5 2015 and then the Superseding Indictment, and we certainly
6 read this language as alleging that Mr. Greebel is being
7 charged, although he's not charged in Counts One through
8 Six, he is -- there is a serious allegation here that Martin
9 Shkreli, together with Evan Greebel and others, orchestrated
10 all four schemes, and we did take it that way. And I think
11 that's a reasonable inference to draw, and I think other
12 people will draw the same inference and I know the language
13 has appeared repeatedly in briefs and in arguments.

14 I know the government concedes or recognizes
15 because in their opposition they say it is "farfetched for
16 anyone to believe that the government has accused or will
17 accuse Mr. Greebel of being involved in the hedge fund
18 schemes." And if that's the case, all I say is we can moot
19 all of this by the same concession they give if you give the
20 indictment back to the jury.

21 If you give the indictment back to the jury, the
22 government says, okay, strike the language, but otherwise
23 they don't want to. And what confuses me is why? If
24 there's no prejudice to them, and we feel deeply prejudiced
25 by it --

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1 THE COURT: But feeling it and showing it are two
2 different things.

3 MR. BRODSKY: And the only way I can show it, Your
4 Honor, is to say that the arguments related to this will
5 create confusion. It certainly confused us. And it is,
6 under the case law, if it's inconsistent with the
7 government's theory, it should be surplusage and stricken.

8 All I can rely on, Your Honor, is the cases before
9 us that say, you know, where the government has alleged, for
10 example, among other -- use the language among other things
11 in indictment, courts have struck that. And all I can rely
12 on are these prior cases and the case law that says if it's
13 inconsistent with the government's theory, it should be
14 stricken. And if it doesn't add anything and it creates a
15 danger of prejudice, it creates a risk of jury confusion.
16 And it's hard for me to identify beyond that because there's
17 been no trial and there's been no proceeding. But in light
18 of the government's view that it should be stricken if it
19 goes back to a jury, let's just strike it and it will
20 satisfy our concerns about the risks that are presented by
21 this.

22 Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. BRODSKY: Should we go back -- I know we have
25 another motion. Maybe it makes sense, Your Honor, if I step

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1 down.

2 THE COURT: All right. Let's hear from
3 Ms. Kasulis and then you can come back.

4 MS. KASULIS: Your Honor, just to respond briefly
5 because I think it's clear that the Court understands the
6 issues here. You know, we have stated we, obviously, know
7 who is charged in which count in this case and we are --
8 this language is certainly not going to allow us to stand up
9 and say that Mr. Greebel is charged in Counts One through
10 Eight particularly because now that there's been severance,
11 there will be no Counts One through Six that we're even
12 discussing. It's just the Count Seven and Eight so I don't
13 think this language creates any danger along those lines.

14 THE COURT: Well, let's go back.

15 If paragraph 7 though is going to be partly
16 redacted, Superseding Indictment, would you then change the
17 language to talk about orchestrating, would it be two
18 interrelated fraud schemes? I guess, you know, what kind of
19 redaction would you propose? And I'm just trying to get to
20 a solution where you, the government and Mr. Greebel's
21 counsel could just realize a sufficient comfort level to
22 come to some sort of an agreement on this.

23 MS. KASULIS: And I think that's certainly
24 something we would consider doing is saying two interrelated
25 schemes. I haven't thought, you know, a lot about what this

1 redacted version would look like, but I think that's
2 certainly a suggestion that makes sense with respect to
3 redacting the indictment. So we could certainly attempt to
4 create a redacted version with defense to submit to the
5 Court, and if there are any sort of differences of opinion
6 on certain language, we can then submit just those
7 differences to Your Honor if that's how Your Honor would
8 like us to proceed.

9 THE COURT: But why such a strong resistance to
10 just striking this anyway? I understand the case law is in
11 your favor, the Second Circuit case law, but, you know, and
12 I understand that some of the arguments that the defense
13 makes are maybe not based on a reasonable reading of the
14 indictment, but why not just take it out?

15 MS. KASULIS: Your Honor, I think, you know, we
16 feel strongly that there is no legal basis, and we charge a
17 lot of cases in this manner. And so just because, well, you
18 know, what's the harm of striking sort of opens us up to
19 then sort of, you know, redlining our indictment about, oh,
20 like does the government really need that sentence or that
21 sentence? And I think we just don't want to go down that
22 path. We really don't see what the legal basis is here.
23 We've proposed solutions obviously that could, you know,
24 address any of the concerns that Mr. Greebel has. And so we
25 just don't see, you know -- we don't support striking that

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1 kind of language in this instance.

2 THE COURT: Well, all right. I think that if this
3 indictment were to go to the jury just to sort of guide them
4 as to what the charges are, and you've agreed to strike this
5 language from paragraph 7, it just seems odd to me that you
6 would just resist because you want to keep it in there. You
7 would resist striking it whether or not this goes back. I
8 think, you know, certainly as we know you're going to be
9 presenting evidence of the first two schemes involving only
10 Mr. Shkreli or I should say in which he's charged, why not
11 just agree in this instance?

12 MS. KASULIS: Your Honor, I know -- look,
13 obviously we understand the concern. I mean, again, we just
14 don't think there's a basis from which to do so. And, you
15 know, again, any risk of confusion, there really has been no
16 demonstrated prejudice. And, again, a concern that this
17 just opens the government up to just editing of our
18 indictments going forward because, you know, oh, what's the
19 harm and it just addresses this concern that there doesn't
20 seem to be much basis for the concern, I think that's just a
21 road that we do not want to go down.

22 And, again, we're also concerned, Your Honor, that
23 this sort of focusing on this language is really about a
24 bigger issue which is limiting the government with respect
25 to evidence of the two, the first two MSMB schemes charged

1 in the indictment. And so, you know, while we have said
2 that it is farfetched that we would argue that Mr. Greebel
3 orchestrated the four schemes with Mr. Shkreli, there's
4 obviously, the government is going to seek to admit a lot of
5 evidence regarding the MSMB schemes because it really
6 informs, obviously, the two Retrophin schemes in which
7 Mr. Greebel is charged.

8 You know, I just wanted to make -- to correct the
9 record. I don't think that there was any misstatement, but
10 just to make clear, what we had said previously with respect
11 to Mr. Greebel's involvement in the MSMB schemes was that we
12 do not see any evidence that Mr. Greebel, with Mr. Shkreli,
13 made those material misreps and omissions to the investors,
14 but knowledge regarding what happened with respect to those
15 investors and their money and the coverup later on in
16 various ways in order to try to address those investors' ire
17 over what had happened is very relevant to Mr. Greebel's
18 case. And so we just want to make sure that the record is
19 clear with respect to what we have argued in the past, what
20 we have always argued with respect to Mr. Greebel and how
21 the two MSMB schemes, facts related to those schemes are
22 absolutely relevant to Count Seven and Eight and we will
23 move to introduce that evidence at trial.

24 THE COURT: All right. Thank you.

25 MR. BRODSKY: Your Honor, may I just briefly --

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1 THE COURT: Yes.

2 MR. BRODSKY: -- respond to that with respect to
3 the first argument?

4 We have found cases, and I can't cite them to you
5 sitting right here, where the government in the past in
6 published decisions has agreed to strike language in
7 indictments. So the first argument which is that the
8 government doesn't want to agree to strike language because
9 they anticipate future arguments about striking language,
10 that water is under the bridge. The government in the past
11 has agreed to strike language which is inaccurate.

12 In addition, courts have struck language. So the
13 precedent -- there's a whole doctrine of surplusage because
14 of this. And I only think people move to strike when they
15 have a good-faith basis and they have arguments to do so,
16 otherwise the motions are denied.

17 Secondly, Your Honor, we commit to you, we will
18 not argue that if you strike this language it will have any
19 impact on our argument with respect to -- we will not argue
20 the striking of this language limits the government in their
21 ability with respect to what evidence they want to admit in
22 the MSMB Healthcare and the MSMB Capital Hedge Fund Schemes.

23 They will seek to admit what they believe to be
24 relevant evidence is, and as that evidence is admitted or
25 not admitted, we will make the appropriate arguments. But

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1 we will never be arguing to Your Honor that because language
2 was struck that reflects Mr. Greebel's not charged in those
3 schemes, it means that the evidence is further limited.
4 That is not an argument you will hear from us.

5 Should I turn to the motion to dismiss,
6 Count Eight?

7 THE COURT: Did you want to say something else?

8 MS. KASULIS: Just very briefly, Your Honor.

9 In the instances where the government has agreed
10 to strike language, as Mr. Brodsky stated, is because it
11 conceded that the language was inaccurate, and that's not
12 what we're doing here. We haven't conceded that the
13 language is inaccurate, and, therefore, we believe there is
14 no basis from which to strike.

15 THE COURT: Well, I think the word "orchestrated"
16 suggests that he was involved somehow in putting together
17 and effectuating four interrelated schemes, and that's where
18 I somewhat have some hesitation in accepting the
19 government's view.

20 It is technically inaccurate that Mr. Greebel and
21 Mr. Shkreli together formulated and participated in the MSMB
22 fraud scheme. But I agree with the government that as
23 charged and as extensively disclosed, that Mr. Greebel is
24 charged with knowing about this history of the MSMB scheme
25 and assisting Mr. Shkreli in packaging it in a way to effect

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1 and obtain Retrophin assets to nullify MSMB investors.

2 MR. BRODSKY: I understand what the government
3 intends to try to prove to the jury.

4 As we pointed out to Your Honor through email
5 communications, Mr. Shkreli lied to Mr. Greebel about
6 various things related to MSMB, including the very lie they
7 intend to prove against Mr. Shkreli which is that he told
8 Mr. Greebel MSMB entities had \$40 million under management.
9 It is very significant to us that if the jury stands up and
10 they say Mr. Greebel knew about and learned about these lies
11 to investors, well, we'll obviously put on our evidence that
12 will show that Mr. Shkreli lied to him as well. And so I
13 understand the government's argument about they want to
14 allege in connection with Count Seven and Eight that there
15 was a conspiracy and Mr. Greebel knew about these bad things
16 and, therefore, participated in it. And we welcome them in
17 doing it because we think it strengthens our case and it
18 strengths our defense when we're able to show these are
19 lies.

20 But what we feel is important is they seem to say
21 they're not alleging he orchestrated the two schemes, but
22 they don't want to acknowledge that as you -- a fair reading
23 of the language, is that he is accused of that.

24 THE COURT: Well, let's just ask again, Ms.
25 Kasulis, I think you did admit to this in your papers, but

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1 just so I'm clear, the government is not alleging that
2 Mr. Greebel orchestrated this scheme, the MSMB Healthcare
3 and MSMB Capital Hedge Fund Schemes; is that correct?

4 MS. KASULIS: That's correct. We are not alleging
5 that Mr. Greebel orchestrated those two schemes with
6 Mr. Shkreli, but we are alleging that Mr. Greebel was
7 involved during the time period of the MSMB schemes with
8 regard to covering up, the coverup or the paying back or
9 creating interest, et cetera -- there's a number of
10 different ways this occurred -- in attempting to make those
11 investors whole. So that is our -- those are our
12 allegations with respect to Mr. Greebel's involvement in the
13 schemes.

14 MR. BRODSKY: And just to followup, Your Honor,
15 when they say "in the schemes," I think what they mean are
16 schemes in Count Seven and Eight, the Retrophin and the
17 unrestricted share schemes. And they don't mean the Counts
18 One or Four, which are the conspiracies; and then Counts One
19 through Six which are the MSMB Capital and the MSMB
20 Healthcare Schemes.

21 And the reason why these are so important us to,
22 drawing these lines and making it clear is because,
23 obviously, we view every document in our defense through the
24 prism of what the allegation is. And the more clarity we
25 have about what the allegation is, the more we can defend

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1 against that allegation.

2 And so, you know, I think the government is saying
3 if they want to allege what they're alleging with respect to
4 Mr. Greebel, they're going to do it in connection with Count
5 Seven and Eight. They're not doing it in connection with
6 Counts One through Six.

7 THE COURT: Confirm?

8 MS. KASULIS: Confirmed, Your Honor.

9 I feel like we're talking in circles here. I
10 think our position has been clear throughout this case thus
11 far, and so I'm happy to answer any additional questions the
12 Court has, otherwise I'm going to sit down on this one.

13 THE COURT: All right.

14 Do you want to move on to your second motion?

15 MR. BRODSKY: Yes, Your Honor, I do.

16 With respect to the motion to dismiss Count Eight,
17 the government has failed to identify the illegal objective
18 of the agreement. The case law is clear that you can lay
19 out the statutory language, but you need to do more where it
20 just charges generic terms.

21 For example, in United States versus Rosenblatt,
22 554 F.2d 36, pinpoint cite 41, Second Circuit case in 1977
23 that says you can repeat the generic terms of a statute, but
24 it is not sufficient that the indictment shall charge the
25 offense in the same generic terms as in the definition; but

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1 it must state the species, it must descend to particulars.

2 And the indictment here does not allege the
3 objective because what the government says in their
4 opposition brief is that the alleged objective is to
5 "fraudulently control the price and trading of the company
6 stock while concealing the CEO's ownership and control over
7 the company shares." That's from the government's
8 opposition brief at 42.

9 The government says that such control constitutes
10 a violation of the securities laws, but that is, in essence,
11 a tautology because it doesn't explain what is the
12 fraudulent objective. Is the objective what the government
13 says, just to fraudulently control the price and trading of
14 the company's stock, because if that is it, just to control
15 the price and trading, then there are instances in which
16 companies prevent people from trading their stock or they
17 take legal actions to control the price of their stock. And
18 so that is -- sweeps too broadly to define the objective.

19 Is the government arguing that the unlawful
20 objective was to prevent the recipients of the Fearnow
21 shares from actually trading the stock, because that's one
22 possible objective. We theorize that that could be an
23 objective that the government is arguing, and if that's
24 their legal objective, we would want to know this.

25 Parking stock, as Your Honor knows, is not in and

1 of itself an illegal objective, it's just a means and
2 methods of getting there.

3 Is the government arguing that the unlawful
4 objective was that the Fearnow recipients were going to
5 trade with each other and they were going to trade their
6 shares, engage in wash trading, for example. That would be
7 an illegal objective that they're trying to manipulate the
8 stock, and we would understand what the objective is and
9 then we could defend against that charge.

10 Is the government arguing both? Is the
11 government -- what we don't think the government can argue
12 is that concealment is an unlawful objective. If that is
13 what they're arguing, if they're arguing is concealing his
14 ownership of the Fearnow shares is the illegal objective,
15 that's great clarity for us and we would appreciate knowing
16 that.

17 We contrast this, Your Honor, with the allegation
18 in Count One on conspiracy and the allegation in Count Four
19 where it's very clear that they say the conspiracy between
20 Mr. Shkreli and others, not including Mr. Greebel, is to
21 make material misstatements and material omissions to MSMB
22 Capital investors. For example, in Count One, about assets
23 under management, about whether there's an auditor, about
24 whether or not what the returns are and the performance of
25 the returns, performance of the fund.

1 Count Four, it's very clear that the illegal
2 objective between Mr. Shkreli in the gist of the illegal
3 agreement is that Mr. Shkreli and others, excluding
4 Mr. Greebel, are going to make lies and material omissions
5 about MSMB -- to MSMB Healthcare investors about assets
6 under management and the returns. But what's not clear to
7 us, and it's not clear after the government's opposition, is
8 what is the illegal objective. And that seems to be
9 something that the government can tell us, inform us without
10 cabining themselves. We're not asking for a list of all the
11 means and methods. You know, parking is one of the methods.
12 We're not asking for that.

13 What we're asking for is just clarity on what
14 exactly is the unlawful agreement, and since they haven't
15 alleged it and we don't believe they -- maybe they are
16 unable to allege it. If they are unable to allege it, we
17 would move to dismiss. But we feel that it's important to
18 determine this now. And if the government is unable to
19 allege a specific illegal objective, then to dismiss that
20 count.

21 THE COURT: What is it about paragraphs 36 through
22 40 in the Superseding Indictment that you find is difficult
23 to understand about the fraudulent acts alleged in Count
24 Eight?

25 MR. BRODSKY: Your Honor, I'm looking for the

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1 objective and --

2 THE COURT: If the objective is to defraud, to
3 hide, to conceal, to manipulate without telling anybody by
4 engaging in misrepresentations, what is deficient?

5 MR. BRODSKY: Well, what they say in paragraph 36
6 is, at the beginning, that there is an objective to defraud
7 investors and potential investors by concealing his
8 ownership and control of the shares. And if that is the
9 illegal objective, then we are prepared to address that.
10 But there is then language that suggests it's something
11 other than that. And 37 says nothing about what the purpose
12 of the scheme is. 38 says nothing about the purpose. It
13 just provides overt acts allegedly in furtherance of the
14 scheme.

15 But the argument that all it is -- if that is what
16 they're alleging, and we're just looking for clarity. If
17 they're just alleging that it was concealment of
18 Mr. Shkreli's ownership of the shares, that's one thing.
19 They then say, in their opposition to the motion, that it's
20 about controlling the price. But controlling the price has
21 legal -- there's -- legal encompasses legal conduct. And so
22 we want to understand is it to control the price for
23 purposes of getting people to trade the Fearnow shares? Is
24 it to control the price because he's preventing them from
25 trading the shares?

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1 If we don't have an understanding of what the
2 alleged agreement is between Mr. Shkreli and Mr. Greebel,
3 it's impossible for us to know what we're supposed to defend
4 against. It's impossible for us to understand what the
5 nature of the charge is.

6 They've gone beyond the statutory language.
7 They've alleged general language which doesn't provide us
8 with any information about what exactly the illegal
9 objective is.

10 Thank you for your time, Your Honor.

11 THE COURT: Okay. Thank you.

12 MS. KASULIS: Your Honor, just briefly.

13 With respect to paragraphs 36 through 40, I do
14 believe that the object or object of the conspiracy is
15 clear. At the end of paragraph 37, the last sentence is
16 "Shkreli, together with Greebel, selected these employees
17 and contractors to receive the entirety of Retrophin's
18 unrestricted or free trade in shares because Shkreli wanted
19 to exercise control over the price and trading of Retrophin
20 stock."

21 In the very next paragraph, the introductory
22 clause is, "to achieve this fraudulent objective." And so I
23 think it's clear from the indictment that the government
24 does, in fact, allege an illegal objective which is
25 fraudulent exercise or control over the price and trading of

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1 Retrophin's shares. And one of the ways in which he did
2 that was to make sure that he either controlled or
3 beneficially owned all of Retrophin's free trading shares.

4 For the purpose of this motion --

5 THE COURT: Well, just so -- I want to stop you
6 there.

7 The defendant is arguing that controlling shares
8 is not illegal. But what I'm reading is that the indictment
9 charges that there was concealment about how to get there.

10 MS. KASULIS: That's correct.

11 THE COURT: How to get to the control. How to get
12 to the control of the share price and how to get to the
13 control of the number of free trading shares.

14 And although those objectives may not be, per se,
15 illegal, my understanding is what is being charged here is
16 that the concealment to get there, the intent to conceal or
17 to manipulate was part and parcel of the charge, the
18 fraudulent conduct.

19 That's my understanding, but I'd like to be
20 corrected if I've misread it.

21 MS. KASULIS: That's exactly right, Your Honor.

22 And the reason for that concealment and control
23 was to ultimately control the price and the trading of the
24 stock. The trading and the price go hand and hand
25 typically. But that is the objective and that is what is

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1 stated in the indictment, and based on our reading of the
2 law that is sufficient to survive a motion to dismiss.

3 The defendants are -- the defendant, excuse me,
4 I'm used to everyone being together. The defendant is
5 clearly on notice as to what the nature of the charges are.
6 We track the language of both 371 and the relevant
7 securities statutes and we provide even more information
8 than that through the relevant paragraphs in the speaking
9 indictment.

10 It's clear what the object of the conspiracy was
11 as charged and is set forth in the indictment, and on that
12 basis there is no reason to dismiss, to take such an extreme
13 action as dismissing a count of an indictment. I mean, what
14 it sounds like they want is just more information and that's
15 not the basis for a motion to dismiss. And so we believe,
16 based on the reading of the law and what is clearly set
17 forth in the indictment, that there is no basis to dismiss
18 Count Eight here.

19 THE COURT: Did you want to be heard further,
20 Mr. Brodsky?

21 MR. BRODSKY: Just, Your Honor, I mean, again, if
22 the illegal objective is to conceal Mr. Shkreli's ownership,
23 that's one thing and we can address that. If it's control
24 the price, again, because that sweeps broadly and there's
25 sometimes where companies control lawfully and sometimes

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1 they do it unlawfully. We would want to be able to
2 understand and we think it should be dismissed if it's
3 beyond concealment and they're alleging control, there was
4 an agreement to control the price in some unlawful way
5 without explaining what's the unlawful way. We offered a
6 number of examples. It is unlawful -- it is the unlawful
7 objective because Shkreli was going to prevent people from
8 trading or is it the other unlawful objective that he was
9 going to get people to trade to inflate the price?

10 If you look at it from our perspective, Your
11 Honor, in preparing a defense, it's hard for us to know
12 whether we're preparing a defense against legal control,
13 we're preparing a defense that Mr. Shkreli has alleged to
14 have gotten together with Mr. Greebel and others to say you
15 people cannot trade your Fearnow shares. I'm giving it to
16 you. I'm holding it in my name and you can't trade it at
17 all. Or are we defending a different type of case which is
18 completely different, the unlawful objective of you people
19 trade with each other to inflate the price.

20 In the indictments we've seen with respect to
21 conspiracy, when you charge a general conspiracy, it's not a
22 substantive count. There is no substantive count. So when
23 you charge a general conspiracy and you have to charge a
24 specific intent for the individual to have engaged in this
25 conspiracy and you have to charge an agreement between two

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1 or more people to do it. And you say Mr. Greebel had an
2 agreement, we just want to understand what's the agreement.
3 And we think that's fair to ask for that. And if they're
4 unable to articulate it, then we believe that it will be
5 dismissed. Either Your Honor will dismiss it now or Your
6 Honor will dismiss it later. But we think without them
7 alleging an unlawful objective, how can they possibly charge
8 the case?

9 Thank you, Your Honor.

10 THE COURT: All right. Anything else?

11 MS. KASULIS: Your Honor, we just, again, we think
12 that the objective, the fraudulent objective is clear. It's
13 to exercise control over the price of trading Retrophin
14 stock, and the concealment of Mr. Shkreli's control over all
15 of the free trading shares of the stock and the way in which
16 that fraudulent objective was achieved.

17 And so I think it's very clear on the face of the
18 indictment what Mr. Greebel needs to defend against at
19 trial, and, therefore, there is no basis to dismiss this
20 count.

21 THE COURT: All right. Thank you.

22 We expect to issue a decision subsequently.

23 And is there anything else I should address right
24 now before we adjourn?

25 MR. BRODSKY: The only thing, Your Honor, we would

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1 respectfully ask is we know you issued an order on Friday
2 regarding a meet and confer with respect to the subpoenas.
3 We would appreciate being a participant in the meet and
4 confers with respect to the subpoenas, the grand jury
5 subpoenas to Retrophin.

6 THE COURT: Well, I suppose you'll have to work
7 that out with Retrophin because, you know, you've taken a
8 little bit of a position of repose in all of this
9 litigation, and I'm not sure what you want to do, how you
10 want to insert yourself into these discussions. I suppose
11 you could call on the phone and speak to Mr. Shkreli's
12 counsel or Retrophin's counsel and see how you would intend
13 to participate.

14 MR. BRODSKY: We want to -- I'm sorry to
15 interrupt, Your Honor.

16 What we don't want to do is -- what Mr. Shkreli
17 has requested and so forth, that's between him and Retrophin
18 and maybe the government.

19 Our understanding is that the government has
20 issued a number of grand jury subpoenas to Retrophin and
21 that there was going to be some discussion about seeing
22 those subpoenas to Retrophin. And those documents that
23 Retrophin produced to the government and then were produced
24 to us do impact us, and so we wanted to be a part of is the
25 part of the meet and confer with respect to those grand jury

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1 subpoenas.

2 For example, if the government is going to share
3 those grand jury subpoenas, we think they should provide
4 copies of them, but if they aren't going to share them or if
5 they are going to share them or if they're going to do it
6 pursuant to some protective order, we wanted to be a
7 participant in that.

8 THE COURT: Which is why maybe you should have
9 shown up on Friday. I mean, they're actively discussing it
10 as far as I understand. They have tight timeframes.

11 So, Ms. Smith, you can work with Mr. Brodsky on
12 this if you'd like to.

13 MS. SMITH: Your Honor, we are in discussions with
14 Mr. Shkreli. We had provided him additional information
15 after the conference and they're getting back to us as to
16 whether they even need the actual physical documents.

17 Obviously, the trial for this case is much later
18 so we will definitely resolve with Mr. Shkreli by Friday and
19 I'm happy to inform Mr. Greebel's counsel of whatever
20 resolution we reach. And if he has any objections to that
21 or wants additional information as well, we can discuss it
22 with him.

23 I just don't want to hold up the Friday timetable
24 for Mr. Shkreli if there are any additional issues with Mr.
25 Greebel, but we're happy to share the result, the outcome

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1 of those discussions.

2 THE COURT: All right. Thank you.

3 MR. BRODSKY: Your Honor, what I hear the
4 government saying is as early as today or tomorrow they'll
5 provide us with the information.

6 What I don't want --

7 THE COURT: I didn't hear them say that, sir, but
8 why don't you speak about it with Ms. Smith because your
9 client's trial is significantly later than Mr. Shkreli's
10 trial, and we are focusing very hard on getting everybody
11 ready for the June trial.

12 Your trial is four months later. You've heard Ms.
13 Smith say she'll work with you. And I'm not going to order
14 anything in particular regarding the subpoenas at this
15 point. She did provide information, which I think is in the
16 docket, is it not, as to what the subject matters in the
17 subpoena were?

18 MS. SMITH: That is correct, we did.

19 MR. BRODSKY: Yes, Your Honor, we read that.

20 THE COURT: And I think your client, with all due
21 respect, is definitely not similarly situated to Mr. Shkreli
22 in terms of his ability to necessarily seek to breach his
23 asserted privilege or Retrophin's asserted privilege. I
24 think your client was the attorney and so I just would hate
25 to get distracted or thrown off track because you're now

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1 asking for information which Ms. Smith has already indicated
2 that she'll work with you to produce.

3 MR. BRODSKY: Very well, Your Honor.

4 What we didn't want to happen was to be prejudiced
5 if there was some solution worked out or some ruling. We --
6 what we don't want, Your Honor, is and, respectfully, we can
7 do it this way, Your Honor, if in two or three months we
8 filed a different type of motion with respect to Retrophin,
9 what we didn't want to happen, Your Honor, is we didn't want
10 the Court to say, look, you had an opportunity to
11 participate.

12 THE COURT: Well, I did set briefing schedules.
13 I'm not interested, in the middle of my trial with
14 Mr. Shkreli and the trial that follows immediately on the
15 heels of Mr. Shkreli's trial and will take me another four
16 months to try through the summer, to have you bombarding me
17 with motions that had already been set up as far as dates.

18 The only motions you're going to be allowed to
19 file are those that might be impacted by the outcome of the
20 trial. You're on the same schedule as everybody else.

21 MR. BRODSKY: Understood, Your Honor.

22 THE COURT: All right. Good.

23 Is there anything else?

24 MS. KASULIS: No, Your Honor.

25 THE COURT: Thank you.

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MR. BRODSKY: Thank you, Your Honor.
MS. RUBIN: Thank you, Your Honor.
(Proceedings adjourned at 2:59 p.m.)

ANGELA GRANT, RPR, CRR

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter
/s/ Angela Grant May 16, 2017